

**SANITIZED DECISION – DOCKET NOS. 04-055 C & 04-056 W – ROBERT W. KIEFER, JR., ALJ – SUBMITTED for DECISION on MAY 17, 2005 – ISSUED on NOVEMBER 15, 2005**

**SYNOPSIS**

**CONSUMERS’ SALES AND SERVICE TAX – TAXPAYER’S FAILURE TO CARRY BURDEN OF PROOF** – The failure of the taxpayer to appear at a hearing and to present any evidence respecting its claim will result in a denial of relief to the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

**WITHHOLDING TAX – TAXPAYER’S FAILURE TO CARRY BURDEN OF PROOF** – The failure of the taxpayer to appear at a hearing and to present any evidence respecting its claim will result in a denial of relief to the taxpayer. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

**CONSUMERS’ SALES AND SERVICE TAX AND WITHHOLDING TAX -- ASSESSMENT OF ADDITIONS TO TAX FOR NEGLIGENCE OR INTENTIONAL DISREGARD OF RULES OR REGULATIONS** -- W. Va. Code § 11-10-18(c) expressly prohibits the Tax Commissioner from assessing additions to tax against a taxpayer for negligence or intentional disregard of rules or regulations, pursuant to § 11-10-18(c), and for either failure to file a return or to pay tax due and owing, pursuant to the provisions of W. Va. Code § 11-10-18(a).

**CONSUMERS’ SALES AND SERVICE TAX AND WITHHOLDING TAX -- NOTICE TO TAXPAYER OF GROUNDS FOR ASSESSING ADDITIONS TO TAX PURSUANT TO W. VA. CODE § 11-10-18(c)** -- When the Tax Commissioner assesses additions to tax against a taxpayer for either negligence or intentional disregard of rules and regulations, W. Va. Code § 11-10-18(c) requires him to state in his notice of assessment to the taxpayer the reason or reasons that he is assessing said additions to tax.

**CONSUMERS’ SALES AND SERVICE TAX AND WITHHOLDING TAX -- NEGLIGENCE OR INTENTIONAL DISREGARD OF RULES OR REGULATIONS AS GROUNDS FOR ASSESSING ADDITIONS TO TAX PURSUANT TO W. VA. CODE § 11-10-18(c) -- TAX COMMISSIONER’S BURDEN OF MAKING *PRIMA FACIE* CASE** -- When the Tax Commissioner assesses additions to tax against a taxpayer for negligence or intentional disregard of rules and regulations pursuant to W. Va. Code § 11-10-18(c), he is required to provide evidence sufficient to make at least a *prima facie* showing that the taxpayer was either negligent or that it intentionally disregarded rules or regulations.

**FINAL DECISION**

A tax examiner with the Field Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) conducted an audit

of the books and records of the Petitioner. Thereafter, on December 6, 2003, the Director of this Division issued a consumer's sales and service tax assessment against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 1, 2000, through August 31, 2003, for tax in the amount, interest in the amount, computed through December 31, 2003, and additions to tax of in the amount for a total assessed tax liability. Written notice of this assessment was served on the Petitioner on December 8, 2003.

Also, on December 6, 2003, the Commissioner (by the Division) issued a withholding tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the period of January 1, 2000, through August 31, 2003, for tax in the amount, interest in the amount, computed through November 30, 2003, and additions to tax of in the amount for a total assessed tax liability. Written notice of this assessment was also served on the Petitioner on December 8, 2003.

There was no appearance on behalf of the Petitioner when the hearing was convened. The hearing was held, however, without an appearance on behalf of the Petitioner or the Commissioner, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and W. Va. Code St. R. § 121-1-69.1 (Apr. 20, 2003).

### **FINDINGS OF FACT**

1. In its petition for reassessment respecting the consumers' sales and service tax assessment, the Petitioner asserted:
  - a. That it overpaid consumers' sales and service tax for the months of November, 2002 and January, 2003; and

- b. That it was not properly credited with certain payments made by checks, which were identified.

2. In its petition for reassessment respecting West Virginia withholding tax, the

Petitioner asserted:

- a. That the withholding tax for the months of July through September, 2001, and January, February and October, 2002 were estimated and that the estimated amounts were in excess of the actual amounts due;
- b. That it was not properly credited with a payment in August, 2001; and
- c. Due to an internal accounting error, the Petitioner over reported and/or overpaid withholding tax for the year 2003, and that it would file returns showing the lower amounts that were due and owing.

3. The Petitioner was provided with notice that it was required to appear at the evidentiary hearing and present evidence respecting the reasons it believed that the assessment was erroneous, unlawful, void or otherwise invalid.

4. The Petitioner did not appear at the time and place of the hearing and presented no evidence to support the allegations set forth in its petition for reassessment.

5. The State Tax Commissioner assessed additions to tax for failure to file and failure to pay, under W. Va. Code 11-10-18(a)(1) & (2), and for negligence, under W. Va. Code 11-10-18(c).

6. The grounds stated by the State Tax Commissioner for assessing additions to tax on the basis of negligence are set forth in the audit findings portion of the audit workpapers, not in his notice of assessment.

7. The grounds stated by the State Tax Commissioner for negligence on the part of the Petitioner, as evidenced by the audit workpapers in this matter, set out a *prima facie* case for negligence on the part of the Petitioner.

## **CONCLUSIONS OF LAW**

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment issued against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002].

2. With one exception noted below, the Petitioner in this matter has failed to carry its burden of showing that the assessments issued against it are erroneous, unlawful, void or otherwise invalid.

3. When the State Tax Commissioner assesses additions to tax for negligence or intentional disregard of rules or regulations, such assessment is in lieu of an assessment of additions to tax under W. Va. Code §§ 11-10-18(a)(1) & (2), and additions may not be assessed under either or those subsections.

4. The State Tax Commissioner stated with sufficient particularity his reasons for imposing additions to tax for negligence or intentional disregard of rules or regulations, and has presented evidence sufficient to make a *prima facie* case that the Petitioner was negligent or intentionally disregarded properly promulgated rules or regulations.

5. However, the State Tax Commissioner failed to state his reasons for imposing additions to tax for negligence or intentional disregard of rules or regulations in his notice of assessment, instead stating them in the audit findings portion of the audit workpapers, thereby rendering the assessment of such additions void *ab initio*.

## **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumer's sales and service tax assessment issued against the Petitioner for the period of January 1, 2000, through August 31, 2003, for tax in the amount, interest in the amount, through December 31, 2003, and additions to tax in the amount, totaling, should be and is hereby **AFFIRMED** as to the tax in the amount and interest in the amount, through December 31, 2003, for a total liability. However, the additions to tax, in the amount are **VACATED** in full.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that withholding tax assessment issued against the Petitioner for the period of January 1, 2000, through August 31, 2003, for tax in the amount and interest in the amount through November 30, 2003, and additions to tax for a total liability, should be and is hereby **AFFIRMED** as to the tax in the amount and interest through November 30, 2003, for a total liability. However, the additions to tax, in the amount are **VACATED** in full.

Interest continues to accrue on both assessments until they are fully paid.